Supreme Court, U.S.
FILED

96 669 OCT 25 1996

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NO. 96-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHNNY DUPREE et al.,

Appellants,

vs.

MIKE MOORE et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the District Court had authority (i) to stay its own judgment after the Supreme Court issued its certified judgment or (ii) to stay the judgment of the Supreme Court?

Whether events anticipated at the time a final judgment is entered can support post-judgment relief under Fed. R. Civ. P. 60(b)(5) or (6)?

Whether the District Court's order staying enforcement of an unprecleared statute undermines the Voting Rights Act?

Whether judicial preclearance by the District of Columbia District Court operates to preclear retroactively a statute that was never properly submitted for administrative preclearance?

PARTIES TO PROCEEDINGS BELOW

The Appellants (Plaintiffs below) are Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as members of the Board of Trustees of the Hattiesburg Public School District. The current Board members are Dr. Joe Paul, Roger McDowell, Daisy Thorne, Sam Buchanan and Warren G. Hood.

The Appellees (Defendants below) are Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi.

The other Appellees (Defendants/Intervenors below) are The Lamar County Board of Education and Trustees, in their official capacities, and the Forrest County School District and Members of its Board of Trustees, in their official capacities.

The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

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IN THE

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October Term, 1996

No. 96-_____

JOHNNY DUPREE et al.,

Appellants,

vs.

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Appellees.

INTRODUCTION

The Appellants file this direct appeal from an order of the United States District Court for the Southern District of Mississippi, dated July 30, 1996 and the court's denial on August 19, 1996, of Appellants' motion to vacate the order. The District Court held that the injunction granted under § 5 of the Voting Rights Act in favor of the Appellants against enforcement of the repeal of Miss. Code Ann. § 37-7-611 should be stayed pending a decision by the District Court for the District of Columbia in an action for judicial preclearance filed by the State of Mississippi.

OPINION BELOW

The opinion of the District Court (App. A-1) is not yet reported.

JURISDICTION

The District Court issued an order granting a stay on July 30, 1996, and denied the Appellants' motion to vacate the stay on August 27, 1996. A notice of appeal was filed on August 27, 1996. App. D-1. The Court has jurisdiction pursuant to 42 U.S.C. § 1973c.

STATEMENT OF THE CASE

On June 10, 1996, after more than six years of litigation, the Court summarily affirmed the District Court's decision that the voting change effected by the repeal of Miss. Code Ann. § 37-7-611 was unenforceable because the State of Mississippi failed to comply with the Voting Rights Act. Dupree vs. Moore, 135 L. Ed. 2d 186 (1996). For decades, Mississippi law, as reflected in § 37-7-611, required that whenever a city annexed territory, the city school district's boundaries automatically expanded to include the territory annexed by its parent city. The State attempted to change this policy in 1986 by repealing § 37-7-611. As a result, residents in an area annexed by a city would remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created an anomaly in voting. The newly annexed city residents would continue to elect directly the board members of their county, or suburban, school district, and at the same time indirectly select the board members of the city school district by participating in city council elections.[1]

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[1] The background of this case is detailed in the four decisions issued by the District Court:

(1) Dupree vs. Mabus, 776 F. Supp. 290 (S.D. Miss. 1991) (Dupree I), vacated sub. nom., Dupree vs. Moore, 503 U.S. 930 (1992);

A brief review of the procedural history of Dupree places the present appeal in context. In Dupree I, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. 776 F. Supp. at 303. The Supreme Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. 646 (1991). 503 U.S. 930 (1992). On remand, in 1993, the District Court held that, when measured by the principles outlined in Clark vs. Roemer, 500 U.S. 646 (1991), the repeal of § 37-7-611 had not been precleared under § 5 of the Voting Rights Act because the State did not specifically identify the voting change effected by the repeal. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II). Later, on remand for clarification of the remedy, the District Court explained that the scope of its injunction extended to both the explicit and implicit repeal of § 37-7-611. Dupree vs. Moore, H90-0043(W) (S.D. Miss., Dec. 29, 1995) (Dupree III). The Supreme Court summarily affirmed the District Court's decision on June 10, 1996. 135 L. Ed. 2d 186 (1996). On July 10, 1996, the Supreme Court issued its certified judgment.

On July 17, 1996, the State filed an "Emergency Motion for Stay" and requested that the District Court "enter its order staying the implementation of its decisions" that enjoined enforcement of the repeal of § 37-7-611. In

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(2) Dupree vs. Moore, 831 F. Supp. 1310 (S.D. Miss. 1993) (Dupree II), appeal dismissed, 127 L. Ed 2d 69 (1994), and vacated, 131 L. Ed. 2d 550 (1995);

(3) Dupree vs. Moore, No. H90-0043(W) (S.D. Miss., Dec. 29, 1995) (Dupree III), aff'd mem., 135 L. Ed. 2d 186 (1996); and

(4) Dupree vs. Moore, No. H90-0043(W) (S.D. Miss., Aug. 7, 1996) (Dupree IV), application to vacate stay denied, 65 U.S.L.W. 3204 (Sept. 6, 1996).

response to the Appellants' position that the District Court had no authority to stay the Supreme Court's judgment, the State in its rebuttal brief also asserted Fed. R. Civ. P. 60(b)(5) and (6) as bases for its motion.

On July 30, 1996, the District Court, with one judge dissenting, entered an order granting the stay and issued its opinion on August 7, 1996. Dupree vs. Moore, No. H90-0034(W) (S.D. Miss., Aug. 7, 1996) (Dupree IV). App. A-1; App. C-1. Although disavowing the need to determine the precise basis for granting relief, the District Court considered it "fundamental that our remedial powers permit our modifying or staying the implementation of such injunctive relief in light of subsequent developments." App. A-12. The Court quoted Landis vs. North Am. Co., 299 U.S. 248, 254 (1936): "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." The court also cited Fed. R. Civ. P. 60(b)(5) and (6) as alternative authority for its stay. App. A-12.

The court offered two reasons for the stay. First, after the Supreme Court issued its certified judgment, the State filed for judicial preclearance in the District of Columbia District Court. App. A-12.[2] In the light of that action, the District Court held it was "free to consider that change in circumstances in determining how our judgment should be implemented and whether implementation should be stayed pending a decision in that new action." App. 13. The State's decision to delay filing for judicial preclearance until it lost in Dupree was excused because "various cost and

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[2] The State's action for judicial preclerance is Mississippi vs. Reno, No. 1:96CV01711.

other most significant considerations impact on a State's selection" of its options. App. A-14. The State "[o]bviously could have" filed the judicial preclearance suit earlier but did not act in "bad faith" by choosing not to do so. App. A-14. In addition, "it is not appropriate to penalize the school districts in the State because the lawfully permitted strategic choices made by the State's Attorney General were not successful." App. A-14-15.

Second, the District Court granted a stay "to prevent the disruption that would occur if our rulings were implemented and the District of Columbia court later granted judgment for the State." App. A-15. If city school districts in Mississippi expand into annexed territory "currently under the control of the county school districts, and the State is successful in the District of Columbia, then questions such as the return of property to the county school districts will result in further disruptions." App. A-15. In addition, "when implementing our rulings, their impact on the non-voting aspects of the affected statutes must be considered." App. A-15. The District Court viewed it as "premature for us to undertake to resolve the complex issues involved in crafting a limited remedy for a § 5 violation ... until after a decision has been reached on the State's declaratory judgment action in the District of Columbia." App. A-16.

In dissent, Judge Wingate noted that the District Court lacked authority to stay its judgment after the Supreme Court affirmed the judgment. App. A-24. In addition, the State failed to present circumstances sufficient to support relief under Fed. R. Civ. P. 60(b)(5) and (6), and the court's inherent authority to control its docket did not apply to staying a final judgment affirmed by the Supreme Court. Finally, the majority's decision undermines § 5 of the Voting Rights Act. App. A-25-26.

> In addition to the plaintiffs, there is another victim here, § 5 itself. The majority's decision promises to undermine the directive and thrust of § 5. Section 5 relies upon the power of the injunction to prevent a covered state from imposing an unprecleared law upon its populous. Here, without benefit of any unexpected consequence befalling the State of Mississippi after the Supreme Court's ruling, the majority has decided to withhold its injunctive hand and, instead, politely wave at the defendants as they march by to another court and continue to operate as usual. Section 5 should stand for more. [App. A-27]

THE QUESTIONS ARE SUBSTANTIAL

The District Court lacked authority to stay its own judgment or the Supreme Court's judgment.

As the District Court noted, it did not precisely state the basis for its order. To the extent the court's order is a stay, it is contrary to two well-settled principles of jurisdiction. First, the power of a district court to issue a stay of its own judgment exists until the mandate of the appellate court issues. The power to grant a stay expired in this case when the Supreme Court issued its certified judgment on July 10, 1996. "[I]t is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court." Hawaii Housing Auth. vs. Midkiff, 463 U.S. 1323, 1324 (1983) (Rehnquist, C.J., in chambers). The District Court, however, stayed the judgment after the Supreme Court

issued its certified judgment. This holding creates a conflict with other courts.[3]

Second, a district court has no jurisdiction to stay the mandate of an appellate court. After an appellate mandate issues, any stay sought is of the appellate mandate, not the district court's judgment. Apparently for strategic reasons, the State chose not to file a petition for rehearing in the Court, not to seek a stay of the Court's judgment, and not to move the Court to recall its mandate. The District Court's stay of the Supreme Court's judgment was improper and in conflict with decisions of other courts.[4]

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[3] See Belyeu vs. Johnson, 82 F.3d 613, 615 (5th Cir. 1996) ("Whatever jurisdiction the district court may have had over matters 'in aid of the appeal' ended at least, when our mandate issued."); Rakovich vs. Wade, 834 F.2d 673, 674 (7th Cir. 1987) (district court's power to grant stay pending appeal exists "by virtue of its original jurisdiction over the case and continues to reside in the district court until such time as the court of appeals issues its mandate"); Brinkman vs. Department of Corrections, 857 F. Supp. 775, 777 (D. Kan. 1994) (citations omitted) (A "district court retains the authority throughout the pendency of the appeal to stay its judgment, but, upon issuance of the mandate, loses the power to stay the judgment."); Gander vs. FMC Corp., 733 F. Supp. 1346, 1347 (E.D. Mo. 1990) ("The power of a district court to grant a stay of judgment pending appeal terminates when the [appellate court] issues its mandate.").

[4] See In re Stumes, 681 F.2d 524, 525 (8th Cir. 1982); Brinkman, 857 F. Supp. at 777; Gander, 733 F. Supp. at 1347; United States vs. White, 1989 WL 515835, at *2 (W.D.N.Y. 1989); Mister vs. Illinois Central Gulf RR., 680 F. Supp. 297, 298 (S.D. Ill. 1988); Hovater vs. Equifax Servs., Inc., 669 F. Supp. 392, 393-94 (N.D. Ala. 1987); Deretich vs. City of St. Francis, 650 F. Supp. 645, 647 (D. Minn. 1986); Studiengesellschaft Kohle vs. Novamont Corp., 578 F. Supp. 78, 80 (S.D.N.Y. 1983); Kozman vs. TWA, 145 F. Supp. 140, 141 (S.D.N.Y. 1956); United States vs. Shaw, 115 F. Supp. 532, 532-33 (D.D.C. 1953). One court has suggested the question may be an open

The District Court's order conflicts with the court's interpretation of Fed. R. Civ. P. 60(b).

The Supreme Court's July 10, 1996, certified judgment "relates to the record and issues then before the court, and does not purport to deal with possible later events." Standard Oil Co. vs. United States, 429 U.S. 17, 18 (1976) (per curiam). The "later events" upon which the District Court relied here were the State's decision to seek judicial preclearance after it lost Dupree and the effect of § 37-7-611 on school districts in Mississippi. Relying on Fed. R. Civ. P. 60(b)(5) and (6), the District Court modified its injunction by staying its effect until the District of Columbia decides Mississippi vs. Reno.

Rule 60(b)(5) permits relief from a judgment when "it is no longer equitable that the judgment should have prospective application." The standard applicable to the District Court's modification of the injunction is presently unclear. The circuit courts of appeals are in conflict over whether the Court's decision in Rufo vs. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992), which concerned modification of a consent decree in institutional reform litigation, governs any type of injunctive decree rather than United States vs. Swift & Co., 286 U.S. 106 (1932), which traditionally applied to modification of an injunction. Some circuits hold that Rufo is limited to institutional reform litigation.[5] Other

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one. Cementos Guadalajara vs. United States, 727 F. Supp. 614, 618 (C.I.T. 1989).

[5] See Lorain NAACP vs. Lorain Bd. of Educ., 979 F.2d 1141 (6th Cir. 1992)(en banc), cert. denied, 509 U.S. 905 (1993); W.L. Gore & Assocs., Inc. vs. C.R. Bard, Inc., 977 F.2d 558 (Fed. Cir. 1992).

circuits hold that Rufo applies to any injunction.[6] The circuits that consider Rufo to have a limited scope apply Swift.

Resolving the conflict is not critical to reversing the District Court's order. Under either standard, the District Court erred by granting relief under Rule 60(b)(5).

Rufo holds that modification of an injunction is proper only if there is "a significant change in circumstances." 502 U.S. at 383. But "modification should not be granted where a party relies upon events that actually were anticipated at the time" judgment was entered. Id. at 385. Here, neither basis for the District Court's order represents a "significant change" sufficient to support relief under Rule 60(b)(5).

Since its passage, the State has been fully aware of the effect of § 37-7-611 on school districts. In 1991, in its first pleading filed in the Supreme Court, the State referred to the "potential adverse effect of [§ 37-7-611] on county school districts surrounding municipal separate school districts." Dupree vs. Moore, No. 90-1977, J.S. p.3 n.1. In fact, the State characterized § 37-7-611 as providing "for the 'hostile takeover' of students and tax base as a result of a municipal annexation." (Id. p.3) The Appellees addressed repeatedly in the District Court the effect of § 37-7-611 -- reduction in tax base and loss of students -- that created in part the basis for the District Court's order. The State also referred to the effect of § 37-7-611 in its 1990 request to the

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[6] See Building and Constr. Trades Council vs. NLRB, 64 F.3d 880 (3d Cir. 1995); United States vs. Western Elec. Co., 46 F.3d 1198 (D.C. Cir. 1995); see also Valentine Sugars, Inc. vs. Sudan, 34 F.3d 320 (5th Cir. 1994).

Attorney General for reconsideration of the objection to § 37-7-611. Dupree, No. 95-1623 J.S. App. 236a. The State has always been aware of the effect of § 37-7-611 on Mississippi school districts.

Moreover, the effect of § 37-7-611 on school districts is no different in 1996 that it was in 1989, when the Attorney General first objected to the repeal of that statute, or in 1990, when he refused to withdraw the objection, or in 1993, when Dupree II was issued, or in 1995, when Dupree III was decided. Section 37-7-611's provision for automatic expansion of a city school district's boundaries has been the law in Mississippi since 1926. App. A-2. The State has fully understood the effect of § 37-7-611 on Mississippi school districts throughout Dupree and, as a result, relief under Rule 60(b) is unavailable.

The District Court's reliance on the filing of the District of Columbia action is also not a sufficient basis to grant relief under Rule 60(b)(5). Filing for judicial preclearance was an option available to the State at any point during the six years that Dupree has repeatedly traveled between the District Court and the Supreme Court. That option did not become available only after the Supreme Court affirmed the District Court's injunction. Rather, the State's decision to file, based on strategic considerations, is the new development. The District Court's interpretation of Rule 60(b)(5) allows the State to manipulate or create the "change in circumstances" upon which the State then uses as the justification for modification of the injunction. The "change in circumstances" was at all times under the control of the State.

The District Court accepts the State's admission that the decision not to file until it lost in Dupree was strategic.

But a party's deliberate decision to invoke or bypass a particular litigation option is not the "significant change in circumstances" required by Rufo. The District Court relied in part on the State's good faith pursuit of Dupree. A covered jurisdiction's "good faith implementation of a [voting] change" does not remove the potential for discrimination or excuse compliance with the Voting Rights Act. NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 180 (1985). A state's purported "good faith" choice of strategic litigation options is even less of a reason to permit enforcement of an unprecleared law.

The District Court's willing acceptance of the State's "strategic choices" argument is contrary to Hampton County in another respect. The Court responded to South Carolina's decision to delay submitting a statute for preclearance by noting that "[t]o the extent that appellees found themselves in a dilemma, however, it was largely of their own making." Id. at 180. The State of Mississippi could have filed the declaratory judgment action at any time since 1989, when the Attorney General first objected to the repeal of § 37-7-611. The consequences for the State's delay should not fall on the Plaintiffs, whose constitutional rights are being violated.

Rufo also holds that the modification "must not create or perpetuate a constitutional violation." 502 U.S. at 391 (emphasis added). The District Court's order perpetuates a constitutional violation. By staying its injunction, the District Court allows the State to enforce the repeal of § 37-7-611, despite a unanimous Supreme Court decision that the law was not precleared and despite a finding by the Attorney General that the law is racially discriminatory. The District Court's decision is contrary to Rufo.

The District Court's stay order is also inconsistent with Swift, which holds that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" can support modification. 286 U.S. at 119. Swift teaches that the proper inquiry is "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." Id. In other words, has the need for an injunction to force the State to comply with the Voting Rights Act been reduced "to a shadow". Swift requires a significant showing to support modification.

> [M]odification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseeness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Co. vs. American Oil Co., 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), cert. denied, 395 U.S. 905 (1969). Neither the effect of § 37-7-611, known for so long by the State, nor the State's tactical decision to file in the District of Columbia, after bypassing that option for more than six years, rises to the level of the "grievous wrong evoked by new and unforeseen conditions" required by Swift.

Rule 60(b)(6) permits a district court to grant relief from a final judgment for reasons other than those listed in clauses (1)-(5). This subdivision applies only in "extraordinary circumstances." Liljeberg vs. Health Services Acquisi-

tion Corp., 486 U.S. 847, 864 (1988). A "strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." Id. at 873 (Rehnquist, C.J., dissenting).

The strategic choice made here by the State to delay filing suit in the District of Columbia is not an appropriate basis upon which to grant relief under Rule 60(b)(6). The District Court's reliance on Rule 60(b)(6) is inconsistent with Ackermann vs. United States, 340 U.S. 193 (1950). There, Ackermann chose not to appeal a denaturalization order because of, among other things, cost considerations. Id. at 195. "His choice [not to appeal] was a risk but calculated and deliberate"; as a result, relief was not available under Rule 60(b)(6). In language directly applicable to the State's strategic choice to delay filing suit in the District of Columbia, the Court stated: "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Id. at 198.[7] The key factor is that the State of Mississippi made a conscious and deliberate choice not to file the § 5 action until it lost Dupree. See Lubben vs. Selective Serv. Sys., 453 F.2d 645, 652 (1st Cir. 1972) ("We do not speculate on the reasons why the government did not pursue its direct attack on the Lubben injunction; it is sufficient that the decision to do so was one of unfettered

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[7] The State's judicial preclearance action in the District of Columbia is to an extent an "appeal" of the Attorney General's decision not to grant preclearance of the repeal of § 37-7-611. The State's decision not to appeal until it lost in Dupree is similar to Ackermann's decision not to appeal in that it was "the voluntary, deliberate, free, untrammeled choice of" both parties not to invoke an option available to them. See C. Wright, et. al, Federal Practice and Procedure § 2864, at p.359 (1995) ("Thus, the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made").

choice and free will. Having made that choice, the government must now live with its decision.").[8]

The District Court's order is contrary to the Supreme Court's summary affirmance.

The District Court concluded that its stay "does not have the effect of staying the Supreme Court's mandate" because "the Court did not address what remedy was appropriate for implementing and enforcing" the District Court's judgment. App. A-12-13. That holding is incorrect because it overlooks the effect of the Court's summary affirmance. As a result, the District Court's order deviates from the certified judgment of the Supreme Court.

In a § 5 preclearance action, the District Court addresses three issues: (i) whether the voting change is subject to § 5, (ii) if so, whether § 5's requirements were met and (iii) if the requirements were not met, what is the appropriate remedy. McCain vs. Lybrand, 465 U.S. 236, 250 n.17 (1984). Dupree I held that the repeal of § 37-7-611 was subject to § 5. Dupree II held that the State failed to comply with § 5's requirements and issued an injunction precluding the State from enforcing the repeal of § 37-7-611.

The Supreme Court has specifically addressed the remedy issue in two orders. First, this Court invited the Solicitor General to address the question of what remedy, if any, was appropriate in the light of the Mississippi Supreme

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[8] Throughout this case, the State offered various remedies for the District Court to impose based on the violation of § 5. But the State did not request that the District Court delay implementation of the injunction issued in Dupree II. Rule 60(b) cannot be invoked as a substitute for an appeal of the remedy. See Wright, supra n.14, § 2863, at p.340.

Court's decision that § 37-7-611 was implicitly repealed by another section of the Uniform School Law (§ 52). 130 L. Ed 2d 308 (1994).[9] After receiving the Solicitor General's brief, which recommended a remand to address the severability of the voting and nonvoting aspects of enjoining the repeal of § 37-7-611, this Court remanded with directions for the District Court to clarify whether its remedy included, in addition to an injunction against the explicit repeal of § 37-7-611, an injunction against § 52 of the USL insofar as it implicitly repealed § 37-7-611. 131 L. Ed. 2d 550 (1995). On remand in Dupree III, the District Court clarified its remedy by holding that both the explicit and implicit repeal of § 37-7-611 were enjoined.

Thus, the District Court considered each of the three questions raised in a § 5 preclearance action. By issuing an injunction, which is the typical relief granted when a covered jurisdiction fails to comply with § 5, the District Court applied settled principles. See infra p.20. The District Court necessarily reached and decided the remedy issue. The numerous motions filed by the Appellees directed to altering or amending the District Court's remedy are detailed in that court's opinion. App. A-8-11. The Court's summary affirmance laid the remedy issue to rest in Dupree and the issue is not open to reconsideration.

In Mandel vs. Bradley, 432 U.S. 173 (1977) (per curiam), the Court held that summary affirmances "without doubt reject the specific challenges presented in the statement of jurisdiction," govern the "precise issues presented and necessarily decided," and "should not be understood as breaking new ground but as applying principles established

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[9] See Greenville Pub. Sch. Dist. vs. Western Line Consol. Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 503 U.S. 950 (1992).

by prior decisions to the particular facts involved." Id. at 176. A summary affirmance is a ruling on the merits "in the sense that [it] reject[s] the 'specific challenges presented in the statement of jurisdiction.'" Washington vs. Confederated Bands and Tribes, 439 U.S. 463, 478 n.20 (1979) (quoting Mandel). The issues presented in the statement of jurisdiction are, therefore, important in determining the effect of a summary affirmance. See Anderson vs. Celebrezze, 460 U.S. 780, 784 n.5 (1983) (citing jurisdictional statements in determining whether summary affirmance was controlling). "Questions which merely lurk in the record are not resolved, and no resolution of them may be inferred." Illinois State Bd. of Elections vs. Socialist Workers Party, 440 U.S. 173, 183 (1979). By no stretch of the imagination could the remedy issue be viewed as merely lurking in the record. The remedy issue was the central focus of this litigation after August 1993, when the District Court issued Dupree II.

The remedy issue was squarely raised by the jurisdictional statements in Dupree. The jurisdictional statement filed by the State and the Forrest County School District presented these two questions:

> 3. Whether the district court was correct in denying the joint motions of Defendants and Defendants/Intervenors for new trial, to alter or amend judgment and/or for a remedy, which were filed after the district court's decisions on the first and second remands?
>
> 4. After finding that the enactments at issue (§ 47 and § 52 of the Mississippi Uniform School Law of 1986) were not precleared, to what extent does the district court have a duty to fashion a voting remedy?

Dupree, J.S. No. 95-1623. The Lamar County School District's jurisdictional statement contained these two questions:

> 4. Did the three-judge district court err in construing its duties under § 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?
>
> 9. Whether the remedy for failure of preclearance is one that affects voting as opposed to ceding geographic territory, students, tax bases and tax revenues to adjoining urban school districts?

Dupree, J.S. No. 95-1624.

In addition to these questions, the body of the Appellees' jurisdictional statements dealt at length with the remedy issue. The State contended that the injunction issued by the District Court was not "a specific remedy outlining the relief to which the Plaintiffs were entitled." Dupree, No. 95-1623, J.S. p.24. In addition, the State alleged that the remedy caused "chaos" and "massive confusion within the educational system of Mississippi." Id. p.25. The State asserted that the District Court failed to carry out its obligation to "fashion a specific voting remedy" that was "equitable and practicable." Id. p.26 (citing McCain vs. Lybrand and Clark vs. Roemer). The concluding two pages of the State's jurisdictional statement removes any doubt that the remedy issue was specifically presented to the Court on appeal.

> At every turn, the district court failed to meet the third requirement set forth in McCain vs. Lybrand, that of determining the appropriate relief. It is not sufficient to enjoin enforcement of both voting and non-voting aspects of sweeping provisions of a comprehensive legislative act. The court should have heard evidence and then should have adopted a more limited remedy which would wreak as little havoc with the nonvoting aspects of the Mississippi Uniform School Law as possible.

Dupree, No. 95-1623 J.S. p.27. The State then argued that the appropriate remedy in this case should have been limited to "a voting remedy." Id.

The Lamar County jurisdictional statement noted that the post-judgment motions filed after Dupree II and Dupree III questioned whether the District Court's remedy "would affect voting in the school district elections and/or geographic territory by ordering the Hattiesburg School District boundaries moved to the city's urban limits, thereby absorbing students, tax base, and tax revenues." No. 95-1624 J.S., pp.6-7. A section of Lamar County's jurisdictional statement is titled "A § 5 Decision Must Address The Remedy To Be Imposed" and is devoted solely to the remedy issue. Id. pp.14-16. Later, Lamar County notes a purported conflict regarding "the scope of the remedial powers of a three-judge district court in a § 5 voting rights case" and questions whether the District Court had authority "under § 5 to carve up the Lamar County School District." Id. p.21.

In the light of the issues presented and the arguments made by the Appellees in Dupree, the District Court's holding that the remedy issue remains undecided is clearly wrong. The District Court's stay, therefore, "flout[s] the mandate" of the Supreme Court. See Standard Oil Co. vs. United States, 429 U.S. 17, 18 (1976) (per curiam). The Court's "mandate" (the certified judgment) affirmed the injunction granted by the District Court, which in turn "has no power or authority to deviate from the mandate." Briggs vs. Pennsylvania R. Co., 334 U.S. 304, 306 (1948); see FCC vs. Pottsville Broadcasting Co., 309 U.S. 134, 140 (1940); In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).[10]

The District Court's order undermines the Voting Rights Act.

By permitting an indisputably unprecleared law to be enforced, the District Court's decision undermines the purpose of § 5. "In order to prevent changes that have a discriminatory purpose or effect, § 5 requires covered jurisdictions ... to obtain preclearance by one of two

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[10] The District Court's reliance on Landis vs. North Am. Co., 299 U.S. 248 (1936), is misplaced. There, the existence of another action implicating the same issues convinced the district court to grant a stay, which was issued before the defendants even filed their answers. Id. at 250. The type of stay authorized by Landis exists to avoid duplicative litigation. See Coit Independence Joint Venture vs. FSLIC, 489 U.S. 561, 585 (1989); Moses H. Cone Mem. Hosp. vs. Mercury Constr. Corp., 460 U.S. 1, 20 n.23 (1983); Will vs. Calvert Fire Ins. Co., 437 U.S. 655, 663 (1978); Colorado River Water Conservation Dist. vs. United States, 424 U.S. 800, 817 (1976). The authority to control its docket cannot be equated, as the District Court did here, with authority to grant relief from a final judgment after it was affirmed by the Supreme Court.

methods before implementing new voting practices." Clark vs. Roemer, 500 U.S. 646, 648 (1991); see NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 175 n.19 (1985) ("Generally, statutes that are subject to § 5 are ineffective as laws until they have been cleared by federal authorities."); Connor vs. Waller, 421 U.S. 656, 656 (1975) ("Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5.").

The District Court's error is compounded by the additional factor that the Attorney General objected to the law because it is discriminatory. If a covered jurisdiction violates the Act, as Mississippi did here by failing to obtain preclearance, "§ 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the" change from being carried out. Clark, 500 U.S. at 654 (emphasis added). The District Court's stay ignores these principles.

The District Court enjoined enforcement of the repeal of § 37-7-611 until the State complies with the preclearance requirements of the Voting Rights Act. This remedy is entirely consistent with the remedy either affirmed or mandated by the Court in prior § 5 cases. "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." Clark vs. Roemer, 500 U.S. at 652-53; see also Dougherty County Bd. of Educ. vs. White, 439 U.S. 32, 36 (1978); Berry vs. Doles, 438 U.S. 190, 191 (1978) (per curiam); Georgia vs. United States, 411 U.S. 526, 541 (1973); Perkins vs. Matthews, 400 U.S. 379, 397 (1971); Allen vs. State Bd. of Elections, 393 U.S. 544, 572 (1969).

By virtue of the stay, the State is excused from the injunction for the near future and can enforce a law the Attorney General found to be discriminatory. The District Court suggests that because the impact of the repeal of § 37-7-611 on voting is minimal in comparison to the effect on nonvoting concerns, such as tax base and student attendance, the ordinary remedy of an injunction for a § 5 violation may be inappropriate. But that reasoning would apply in any Voting Rights Act case. For example, whether a particular election for the governing board of a county or city should be set aside could have far-reaching ramifications unrelated to voting. Deciding to reject a state's redistricting plan for congressional districts or its own legislature could have a profound effect on public policy issues that have no relation to voting. The District Court's holding that an unprecleared law found by the Attorney General to be discriminatory should be enforced because nonvoting concerns are considered paramount is a perverse interpretation of the Act and in fact subverts the objective of the Act.

The District Court order's also undermines the Voting Rights Act by sanctioning retroactive preclearance in circumstances that do not support that concept. The District Court essentially held that, if the District of Columbia District Court grants preclearance, the repealer of § 37-7-611 will be retroactively precleared. App. A-15. This holding misapprehends the nature and effect of after-the-fact preclearance. This concept applies only in the remedy phase of a § 5 preclearance action like Dupree, not in the context of a declaratory judgment action in the D.C. District Court. The two Supreme Court cases that address "retroactive preclearance" demonstrate that judicial preclearance of the repeal of § 37-7-611 will not apply retroactively.

In Berry vs. Doles, 438 U.S. 190 (1978) (per curiam), the Court entered an order directing the district court to require the state to submit a voting change for preclearance within 30 days. "If approval is obtained, the matter will be at an end. If approval is denied, [the § 5 plaintiffs] are free to renew" their request for a remedy in the district court. Id. at 192-93. Berry confirms that after-the-fact preclearance is a matter for the district court to consider in determining the appropriate remedy for a violation of § 5. See id. at 190 ("This appeal presents a challenge to the scope of the remedy allowed" under § 5.); id. at 192 ("In [an earlier case], we had occasion to address the remedy issue which now confronts us.").

More recently, the Court carefully avoided approving the concept of "retroactive preclearance," noting that a district court's reliance on Berry as authority for the express adoption of the concept may not have been a "fair characterization of the holding of Berry." NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 182 (1985). In Hampton County the voting changes in issue had never been submitted to the Attorney General. Id. at 182. As in Berry, the Court directed the district court to enter an order allowing the state 30 days in which to submit the changes to the Attorney General for approval. "If [the State] fail[s] to seek this approval, or if approval is not forthcoming, the results of the ... election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand." Id. at 182-83.

If the concept of retroactive preclearance applies as a matter of course, as the District Court suggests, the district court in Hampton County would not have had authority to

set aside the election after the voting changes were precleared by the Attorney General. This holding also confirms that after-the-fact preclearance is a consideration for the District Court in determining the proper remedy for a state's failure to comply with the Voting Rights Act.

There are two material differences between Dupree and Berry and Hampton County. First, in Dupree, the Attorney General objected to the repeal of § 37-7-611. The Attorney General never considered the voting changes in Berry and Hampton County.

Second, both the District Court and the Supreme Court considered the appropriate remedy in Dupree and, in fact, dealt with this issue at length. In Berry, the district court "had reached the question of an appropriate remedy," and, therefore, if after-the-fact approval of the voting change was given, "the matter would be at an end." See Hampton County, 470 U.S. at 183 n.36. In other words, the district court in Berry had already decided that the appropriate remedy would be to allow the election to stand. In Hampton County, the district court never reached the remedy phase and, therefore, "never engaged in the equitable weighing process necessary to determine" the remedy for a violation of § 5. Id.[11]

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[11] The two district court cases that address "after-the-fact" preclearance also confirm its limited application to the remedy phase of a § 5 preclearance action. See Moore vs. Caledonia Natural Gas Dist., 890 F. Supp. 547, 551 (N.D. Miss. 1995) (single district judge dismissed § 5 claims in part because "there is no relief that a three-judge court could grant"); East Flatbush Election Committee vs. Cuomo, 643 F. Supp. 260, 264 (E.D.N.Y. 1986) (three-judge court) (district court declined to set aside election when preclearance obtained shortly after election).

CONCLUSION

For these reasons, Appellants respectfully request that the Court note probable jurisdiction.

Dated: October 25, 1996.

Respectfully submitted,
JOHNNY DUPREE et. al

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, *et al.* **PLAINTIFFS**

v.

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, *et al.* **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT, *et al.* **DEFENDANTS/INTERVENORS**

CIVIL ACTION NO. 1190-0043(W)

Before BARKSDALE, Circuit Judge, and LEE and WINGATE, District Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

The landscape is figuratively (and almost literally) littered with opinions and other papers spawned by this seemingly interminable, and certainly most regrettable, Voting Rights Act litigation filed in early 1990 concerning the Mississippi Uniform School Law enacted in 1986. This action has just completed its third round trip to the Supreme Court; perhaps the State's newly filed declaratory judgment action, brought under the Voting Rights Act in the District of Columbia, will assist the conclusion of this litigation.

Toward that end, as well as for other reasons, on July 30, 1996, this 42 U.S.C. § 1973c and 28 U S.C. § 2284 Voting Rights Act three-judge court (Wingate, J., dissenting) granted the "State Defendants' Emergency Motion for Stay". As indicated in that order, we detail here our reasons for doing so. In order to understand where we are, why we are here, what we have now done, and why we are doing it, it is necessary to retrace in considerable detail our many labored steps along this long and winding road to the schoolhouse.

I.

Prior to 1986, MISS. CODE ANN. § 37-7-611, enacted in 1926, provided that, upon a municipal annexation, the municipal school district would expand automatically with the city limits. In 1977, the Mississippi Legislature created an exception to § 37-7-611, by amending MISS. CODE ANN. § 21-1-59 to provide that such annexation across a county line would not affect the school district in the annexed area unless such school district consented to the annexed territory being included in the school district of the

annexing municipality. Ch. 379, 1977 Miss. Laws 543. Section 21-1-59 was amended again in 1978 to make it applicable to future annexations into a neighboring county. Ch. 312, 1978 Miss. Laws 418.

The Mississippi Legislature enacted the Uniform School Law in 1986. Section 47 of that Law, Ch. 492, 1986 Miss. Laws 687, repealed § 37-7-611. And, § 52 of that Law amended § 37-7-103 (which had concerned changes to school. districts by a county board of education); all references to a county board of education and its authority to alter districts in the county, and all references to a municipal school district and its required consent, were deleted.

Pursuant to § 52, the school board of any school district can alter its boundaries by obtaining the consent of the adjoining school district involved; the school board may "add to such school district any part of the school district adjoining same, and ... detach territory from such school district and annex same to an adjoining district". MISS. CODE ANN. § 37-7-103. (As discussed infra, in *Greenville Public School District v. Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1990), *cert. denied*, 503 U.S. 950 (1992), the Mississippi Supreme Court held that § 52 (§ 37-7-103) implicitly repealed § 37-7-611. As also discussed *infra*, this implicit repeal has been a sticking point in this litigation.)

As explained in 1991 in our first opinion, § 37-7-103, as amended by § 52, was, in effect, a replacement for school distracting procedures. Section 52 created uniformity among school districts with respect to the laws governing school district boundaries and alterations. *See Dupree v. Mabus*, 776 F. Supp. 290, 302 (S.D. Miss. 1991).

The 1977 and 1978 amendments to § 21-1-59, and the repeal of 37-7-611 (*explicitly* by § 47, and *implicitly* by § 52, of the Uniform School Law) had the same effect: municipal school districts no longer automatically expanded with municipal annexations. This created a class of municipal voters who do not reside in the city school system, but who do vote for the city governing authorities who, in turn, select the city's school board.

Annexations by the City of Hattiesburg (City) in Forrest and Lamar Counties were affected by these changes; although the citizens in the annexed areas vote in City municipal elections, the City's school district has not expanded with those annexations.

In 1986, pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Mississippi Attorney General submitted the Uniform School Law for preclearance. The cover letter explained 13 sections and their effect on voting; but, unfortunately, the repeal of § 37-7-611 was not one of those discussed. By latter dated August 29, 1986, the United States Attorney General advised the Mississippi Attorney General that he did not object to the voting changes identified in the cover letter.

Because that letter raised doubts whether the preclearance included provisions other than those 13 specifically listed in the State's cover letter, the Mississippi Attorney General in December 1987 sought affirmative preclearance of § 47 insofar as it repealed § 37-7-611. In February 1988, the United States Attorney General requested additional information concerning the repeal of § 37-7611; and, after the State responded, the United States Attorney General objected in March 1989 to the implementation of § 47 insofar as it repealed § 37-7-611. The State requested

reconsideration; in May 1990, the United States Attorney General declined to withdraw his objection.

In February 1990, while the State was awaiting this May 1990 decision by the United States Attorney General, the plaintiffs (residents and registered voters in the City and Forrest County and members of the Board of Trustees of the Hattiesburg Public School District) filed this action under § 5 of the Voting Flights Act, 42 U.S.C. § 1973c, seeking to enjoin the State of Mississippi and state officials from enforcing the 1977 and 1978 amendments to § 21-1-59, and § 47 of the Uniform School Law, which expressly repealed § 37-7-611. The Lamar and Forrest County Boards of Education and the members of their Boards of Trustees intervened as defendants.

The plaintiffs claimed (1) that the challenged statutes resulted in a change in voting covered by § 5, because the votes of the City voters who also reside in the City's school district would be diluted by those of the annexed area residents, who remain a part of the county school district, but who vote for the City officials who in turn select the members of the City school board; and (2) that the statutes were unenforceable because they had not been precleared pursuant to § 5.

The plaintiffs did not seek to enjoin § 52 of the Uniform School Law, which, as discussed, amended § 37-7-103 and implicitly repealed § 37-7-611. Accordingly, following oral argument in September 1990, we requested supplemental briefs on the effect of § 52. And, the parties filed additional briefs after the Mississippi Supreme Court's above-referenced opinion in *Greenville Public School District* concerning that section.

In our earlier referenced 1991 opinion, rendered that April, we held, *inter alia*, that the repeal of § 37-7-611 by § 47 of the Uniform School Law had been precleared, because it was submitted to the United States Attorney General together with the entire Uniform School Law; but, we held also that the amendments to § 21-1-59 had not been precleared and were, therefore, unenforceable. *Dupree v. Mabus*, 776 F. Supp. 290 (S.D. Miss. 1991). Because we held that the express repeal of § 37-7-611 by § 47 of the Uniform School Law was precleared, we did not address whether the repeal of § 37-7-611 was precleared also by the undisputed preclearance of § 52 of that Law (§ 37-7-103). 776 F. Supp. at 303 n.7. The plaintiffs appealed the holding on the repeal of § 37-7-611; the defendants did not cross-appeal our holding that the amendments to § 21-1-59 had not been precleared.

Two months after our decision, the United States Supreme Court held in *Clark v. Roemer*, 500 U.S. 646 (1991), that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission, *id.* at 658, and reiterated that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority". *Id.* at 656. In March 1992, the Supreme Court vacated our judgment and remanded the case for further consideration in light of *Clark v. Roemer*. *Dupree v. Moore*, 503 U.S. 930 (1992).

Following remand, we directed the parties and the United States, *amicus curiae* aligned with the plaintiffs, to submit supplemental briefs. In those briefs, additional issues were raised, including the proper remedy for any § 5 violation.

In August 1993, this court (Barksdale, J., dissenting) addressed only "the *narrow* issue ... [of] whether the State ... identified the repealer of § 37-7-611 [§ 47 of the Uniform School Law] unambiguously and with the specificity required to constitute a proper submission of the matter to the United States Attorney General for preclearance". *Dupree v. Moore*, 831 F. Supp. 1310, 1313 (S.D. Miss. 1993) (emphasis added). The majority held that, when Mississippi submitted for preclearance the comprehensive Uniform School Law of 1986, of which the repealer of § 37-7-611 (§ 47) was a part, it did not identify with specificity the anticipated voting changes resulting from the repealer and, therefore, had not complied with the standard required by *Clark v. Roemer*. *Id.* at 1317.

The majority stated also that, even if § 52 of the Uniform School Law (§ 37-7-103), which had been precleared by the United States Attorney General, amounted to a repeal of § 37-7-611 by operation of state law, "that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such". *Id.* Accordingly, the majority did not find persuasive the Mississippi Supreme Court's above-described holding in *Greenville Public School District* that the Attorney General had in effect precleared the repeal of § 37-7-611 by preclearing § 52 of the Uniform School Act. *Id.* at 1317 n.9. The majority concluded that the repeal of § 37-7611 by § 47 of the Uniform School Law was ineffective and unenforceable unless and until the State of Mississippi gets either the United States Attorney General to preclear the repealer, or to withdraw his objection, *or the State of Mississippi obtains a declaratory judgment from the District of Columbia District Court stating that the repealer has no discriminatory effect Upon voting rights in Mississippi*". *Id.* at 1318 (emphasis added).

The defendants and intervenors moved to alter or amend, asserting, inter alia, that we should enter findings of fact and conclusions of law on [t]he appropriate remedy, and the practical implications" of the holding that § 47, which *expressly* repealed § 37-7-611, had not been precleared, in light of the fact that § 52, which *implicitly* repealed § 37-7-611, had been precleared. They also filed a "Joint Motion for Remedy", asserting, *inter alia*, that a trial was necessary for resolving the remaining issues, including whether the remedy was to be limited to a voting remedy, pursuant to which the school district boundaries would remain where they are, and the citizens in the annexed areas of Lamar and Forrest Counties would remain as residents of the county school district, but not be allowed to vote for members of the county school boards, and whether § 52 of the Uniform School Law, which implicitly repealed § 37-7-611, granted the remedy they sought.

In addition, the defendants and intervenors moved for a stay pending appeal to the Supreme Court. In October 1993, this court denied the stay; we withheld ruling on the motions to alter or amend and the joint motion for a remedy "until such time as the Supreme Court of the United States has reached its conclusion with regard to the matter now on appeal".

In January 1994, the Supreme Court dismissed for want of jurisdiction the defendants' and intervenors' interlocutory appeals. *Moore v. Dupree*, 510 U.S. 1068 (1994); *Lamar County Bd. of Educ. & Trustees v. Dupree*, ___ U.S. ___, 114 S. Ct. 872 (1994). That April, we denied the defendants' motions to alter or amend, and/or for a remedy. The defendants and intervenors appealed immediately to the Supreme Court.

The Supreme Court invited the Solicitor General to brief the following question on behalf of the United States, as *amicus curiae*:

> In light of the Mississippi Supreme Court's holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss.1991), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) [§ 52 of the Uniform School Law] supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what *remedy*, if any, can a federal court offer for failure to preclear section 47 of the [Uniform School Law], which also purported to repeal § 37-7-611?

Moore v. Dupree, ___ U.S. ___, 115 S. Ct. 352, 353 (1994) (emphasis added); *Lamar County Bd. of Educ. & Trustees v. Dupree*, ___ U.S. ___, 115 S. Ct. 353 (1994). In response, the United States advanced the position that *Greenville Public School District* has no effect on the remedy that a federal court may order in this case, and urged that § 37-7-103 (§ 52) be enjoined. The United States asserted, however, that nonvoting consequences (on school attendance and taxes, etc.) of an injunction prohibiting enforcement of § 52's implicit repeal of § 37-7-611 "create a *significant remedial issue* that ... warrants a remind to the district court for further proceedings". (Emphasis added.)

In April 1995, the Supreme Court vacated our judgment and remanded this case for clarification of whether we had enjoined only § 47 of the Uniform School Law, or whether we had enjoined also the effect of § 52 of that Law, insofar as § 52 implicitly repealed § 37-7-611. *Moore v. Dupree*, ___ U.S. ___, 115 S. Ct. 1684 (1995); *Lamar County Bd. of Educ. & Trustees v. Dupree*, U.S. 115 S. Ct.

1684 (1995). We directed the parties to file briefs, and also allowed the United States, as *amicus curiae*, to do so.

The defendants and intervenors urged that, if we enjoined § 52, we should adopt a remedy limited to voting matters only, leaving intact the non-voting aspects of § 52. The plaintiffs asserted that the remedy proposed by the intervenors is unconstitutional, because it would result in newly annexed city residents being precluded from voting in county school board elections, even though they reside in that district, send their children to county schools, and pay taxes to support the county schools in amounts determined by the county school boards. The United States asserted that, in addition to addressing whether the implicit repeal of § 37-7-611 by § 52 of the Uniform School Law had been precleared, we "should determine [also] whether the non-voting aspect of the change effected by the repeal of [§] 37-7-611 is, as a matter of state law, severable from the voting change effected by the repeal, which in turn will determine the scope of the declaratory judgment and injunction to which plaintiffs are entitled".

In December 1995, this court (Barksdale, J., specially concurring) enjoined enforcement of § 52 of the Uniform School Law, even though it had been precleared by the United States Attorney General, because to permit otherwise would frustrate the previous order enjoining § 47 of that Law. *Dupree v. Moore*, No. H90-0043(W) (S.D. Miss. Dec. 29, 1995) (unpublished). A final judgment was entered in early January 1996.

The defendants and intervenors moved to alter or amend, asserting that there were practical problems as to when the changes resulting from our judgment were to be implemented, seeking limitation of the remedy to an injunc-

tion affecting only voting, and requesting an evidentiary hearing as to the impact and parameters of the remedy on taxes and bond issues in the affected school districts. They also sought a stay pending appeal to the Supreme Court. The plaintiffs responded that issues concerning tax base and where students would attend school would be resolved in a separate, pending desegregation action.

In February 1996, we denied the motion to alter or amend. But, we granted the motion for stay pending appeal. The Supreme Court affirmed this June. *Moore v. Dupree*, ___ U.S. ___, 116 S. Ct. 2493 (1996); *Lamar County Bd. of Educ. Trustees v. Dupree*, ___ U.S. ___, 116 S. Ct. 2493 (1996). On July 17, the defendants filed the emergency motion at hand for a stay of our August 1993 and December 1995 rulings, asserting that their implementation prior to the start of school on August 12 would cause irreparable harm to children in school districts throughout the State. The motion advised that, pursuant to § 5 of the Voting Rights Act, 42 U.S.C. 1973c, the State had instituted a declaratory judgment action in the District Court for the District of Columbia, seeking approval of the repeal of § 37-7-611. The intervenors joined the State in seeking a stay. After expedited briefing, we granted the emergency motion on July 30.

II.

A.

We address first our power to grant the stay in light of the Supreme Court's affirmance of our judgment. In opposing the emergency motion, the plaintiffs asserted that, because the State had not relied expressly on FED. R. CIV. P. 60(b), which plaintiffs contend is the sole basis for

granting the relief, we lacked the power to grant a stay. The defendants replied that they sought relief under, inter alia, FED. R. CIV. P. 60(b).

We need not determine the precise basis for our granting relief; it is clearly within our power. As noted, this court declared that the repeal of MISS. CODE ANN. § 37-7-611 by §§ 47 and 52 of the Uniform School Law was ineffective, and enjoined its enforcement unless and until the State obtained preclearance from either the United States Attorney General or approval by the District Court for the District of Columbia.

It is fundamental that our remedial powers permit our modifying or staying the implementation of such injunctive relief in light of subsequent developments. See *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936) ("the power to stay proceedings is incidental to the power inherent in every court control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

Alternatively, based on the State's seeking a declaratory judgment in the District of Columbia, relief would be appropriate under Rule 60(b)(5), authorizing relief from a judgment when "it is no longer equitable that the judgment should have prospective application", or 60(b)(6), which provides that a court "may relieve a party ... from a final judgment ... [for] any other reason justifying relief from the operation of the judgment".

Contrary to the plaintiffs' assertion, this stay, pending a decision by the District Court for the District of Columbia, does not have the effect of staying the Supreme Court's mandate. In affirming our judgment, the Court did not

address what remedy was appropriate for implementing and enforcing it. Moreover, in prior Voting Rights Act cases, the Court has indicated that the choice of an appropriate remedy for a § 5 violation should be made by the district court. See *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971) (refusing to set aside election conducted under unprecleared law and stating that, "[s]ince the District Court is more familiar with the nuances of the local situation than we are, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties"), *Clark v. Roemer*, 500 U.S. at 659-60 (refusing to set aside judicial elections and stating that the district court is in a better position to fashion relief, because it is more familiar with the nuances of the local situation).

In sum, the State sought the declaratory judgment, as it was entitled -- *and, in essence, had been invited by this court* -- to do after the Supreme Court's decision. We are free to consider that change in circumstances in determining how our judgment should be implemented and whether implementation should be stayed pending a decision in that new action.

B.

We turn now to our reasons for the stay pending a decision in the State's declaratory judgment action.

1.

As noted, the State had two alternatives under § 5 of the Voting Rights Act in light of the voting changes arising out of the Uniform School Law: (1) administrative preclearance by the United States Attorney General; or (2)

a declaratory judgment from the District Court for the District of Columbia. 42 U.S.C. § 1973c. As discussed at length, it opted initially to seek preclearance from the United States Attorney General, and in 1986 submitted the entire Uniform School Law, including §§ 47 and 52, which both repealed § 37-7-611. Most unfortunately, the final word, via litigation, on whether the repeal of § 37-7-611 was precleared was not reached until a few weeks ago, when the Supreme Court affirmed our January 1996 judgment.

It goes without saying both that the Voting Rights Act imposes drastically on a State's power to conduct its affairs, and that it has wide-ranging effects, as evidenced by the fact that, in this case, it has reached into the schoolrooms of Mississippi. See *City of Rome v. United States*, 446 U.S. 156, 179 (1980). Accordingly, the State has now exercised its alternative right under that Act to seek a declaratory judgment that the changes in voting resulting from the repeal of § 37-7-611 do not have a discriminatory purpose or effect. Obviously, it could have done so earlier; but, it was not required to do so. It goes without saying that various cost and other most significant considerations impact on a State's selection from its options. For starters, selecting litigation in a distant and relatively unfamiliar forum -- as required for the declaratory judgment option -- generally would not be the preferred course of action; certainly, it would not be the most economical use of the State's taxpayers, dollars.

While some might question the soundness of the State's strategy in not earlier seeking the declaratory judgment, the State has not acted in bad faith by litigating here, albeit unsuccessfully, its assertion that the repeal of § 37-7-611 was precleared. (For example, initially, we held unanimously that it had been.) In any event, it is not

appropriate to penalize the school districts in the State because the lawfully permitted strategic choices made by the State's Attorney General were not successful.

2.

Our second reason for the stay is to prevent the disruption that would occur if our rulings were implemented and the District of Columbia court later granted judgment for the State. Moreover, until the Supreme Court reached its decision approximately two months ago, no steps had been taken to implement our rulings. (Indeed, we unanimously granted a stay pending appeal to the Supreme Court. That stay ended when the Supreme Court ruled on June 10.)

The 1996-97 school year is about to begin. And, because annexations have occurred involving school districts in addition to those involved in this action, our rulings likely will impact other districts and have the potential to spawn further litigation involving them. If, as a result of implementation of our rulings, municipal school districts expand into annexed territory currently under the control of county school districts, and the State is successful in the District of Columbia, then questions such as the return of property to the county school districts will, result in further disruptions.

Along that line, when implementing our rulings, their impact on the non-voting aspects of the affected statutes must be considered. Although § 5, which is our sole authority for enjoining the enforcement of the state laws in issue, covers only changes in voting, §§ 47 and 52 of the Uniform School Law are not addressed solely to voting; in fact, their impact on voting is minimal in comparison to their impact on students, teachers, school district boundary lines, and tax bases. Before we may craft an appropriate remedy "that in

all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with the least offense to its provisions". *Clark v. Roemer*, 500 U.S. at 660, we will need to consider carefully these non-voting aspects of the laws affected by our rulings, and, perhaps, consider additional evidence.

The question of what remedy would be appropriate is not a simple matter; for example, the suggestions that citizens in the annexed areas not be allowed to vote in certain elections is, to say the least, a drastic measure. It would be most premature for us to undertake to resolve the complex issues involved in crafting a limited remedy for a § 5 violation, taking into account the impact on non-voting aspects of the statutes at issue, until after a decision has been reached on the State's declaratory judgment action in the District of Columbia.

III.

For the foregoing reasons, the emergency motion was granted. We have every confidence that the defendants will vigorously and aggressively pursue their pending Declaratory judgment action, including seeking to have it expedited in every way possible. Should the plaintiffs be of the view that this is not being done, they may seek relief here. Along this line, the defendants are to submit status reports to this court on the progress of that litigation.

SO ORDERED, this the 7th day of August, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, *et al.* **PLAINTIFFS**

v.

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, *et al.* **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT, *et al.* **DEFENDANTS/INTERVENORS**

CIVIL ACTION NO. 1190-0043(W)

Before this three-judge court, convened under the aegis of § 5 of the Voting Rights Act of 1965, Title 42 U.S.C. § 1973c[1] and Title 28 U.S.C. § 2284[2], is the

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[1] Title 42 U.S.C. § 1973c provides in pertinent part:

"Whenever a State or political subdivision ... shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that

in force or effect on November 1, 1964, ... such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure. ...

[2] Title 28 U.S.C. § 2284 provides in pertinent part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, ...
>
> (b) In any action required to be heard and determined by a district court of three judges ..., the composition of the court shall be as follows:
>
> > (1) ... the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. ...

motion of the State of Mississippi to issue an emergency stay in the above styled and numbered cause. In an Opinion and Order dated August 27, 1993, this three-judge court held that when Mississippi submitted its comprehensive Uniform School Law of 1986, of which the express repealer of § 37-7-611[3], Section 47, was a part, Mississippi failed to abide by the standard set forth in *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.2d. 2d 691 (1991) and identify with specificity the anticipated voting changes to be wrought by Mississippi's enactment of Section 47. Accordingly, we found the Section 47 repealer of § 37-7-611 to be ineffective and unenforceable unless and until the United States Attorney General preclears the repealer, or withdraws the objection, or unless and until the State of Mississippi obtains a declaratory judgment from the United States District Court for the District of Columbia that the repealer does not have the purpose and will not have the effect of denying or abridging the right to vote.

The United States Supreme Court vacated the judgment accompanying this court's Memorandum Opinion and remanded this matter for clarification. Specifically, the Supreme Court directed this three-judge court to clarify whether we enjoined only Section 47 of Mississippi's

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[3] Miss. Code Ann. § 37-7-611 (1972) provided in pertinent part:

> Where the corporate limits of any municipality which constitutes a municipal school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become part of such municipal school district. ...

Uniform School Law, 1986 Miss. Gen. Laws ch. 492, or whether we also enjoined Section 52, a precleared portion of that same Uniform School Law, Mississippi Code Annotated Section 37-7-103 (1972 & Supp. 1990), insofar as it implicitly repealed Mississippi Code Annotated Section 37-7-611 (1972). See Moore v. Dupree, ____ U.S. ____, 115 S.Ct. 1684, 131 L.Ed.2d 550 (1995).

By our Order dated December 29, 1995, we responded that Section 52 was also enjoined by this court's Memorandum Opinion, noting that when Section 52 was submitted for preclearance the State of Mississippi had not mentioned that one of the effects of this Section was to repeal § 37-7-611[4]. Our Order concluded that even if Section 52 repealed § 37-7-611, that fact was not submitted to the Attorney General for, preclearance with the specificity required by Clark v. Roemer. Additionally, this court noted that its injunction of Section 52 was rooted in the power of a federal court to issue such commands as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued in exercise of its jurisdiction. United States v. New York Telephone Company, 434 U.S. 1352, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977), citing Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 1090, 22 L.Ed.2d 281 (1969); and Title 28 U.S.C. § 1651 (the All

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[4] Miss. Code Ann. § 37-7-611 (1972) provided in pertinent part:

> Where the corporate limits of any municipality which constitutes a municipal school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become part of such municipal school district. ...

Writs Act)[5]. Finally, we held that the Mississippi Supreme Court's opinion in Greenville Public School District v. Western Line Consolidated School District, 575 So.2d 956 (Miss. 1990), cert. denied, 503 U.S. 950 (1992), which held that § 37-7-611 was implicitly repealed by § 52 of Mississippi's Uniform School Law was not binding on us. We relied on the decision of the United States District Court for the Northern District of Mississippi, the Honorable Neal B. Biggers, Jr. presiding, in Janice M. Nickles, et al. v. Western Line School District, et al., Civil Action No. 4:90-cv-45BO, decided October 30, 1995. Judge Biggers held that Clark v. Roemer was an intervening decision that constituted an exception to the doctrine of res judicata, thus, any binding effect the Mississippi Supreme Court's decision in Western Line may have had was superseded by the United States Supreme Court's decision in Clark v. Roemer.

This three-judge court's decision was affirmed by the United States Supreme Court on June 10, 1996. No party to this litigation sought or has sought rehearing of the matter. Thereafter, on July 10, 1996, the United States Supreme Court issued a certified judgment pursuant to Rule 45.3 of the Rules of the Supreme Court of the United States which provides in pertinent part that, "a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a (copy of the opinion and order of this Court and a certified copy of the judgment." Thus, the Supreme Court's affirmance of this court's Memorandum Opinion dated August 27, 1993 and its clarifying Order dated December 29, 1995 was issued as

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[5] Title 28 U.S.C. § 1651 provides that, " [t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law."

Mandate pursuant to Rule 45.3 and this court's involvement in this matter ceased.

Now, the State of Mississippi, joined by the Forrest County School District, seeks an emergency stay of the certified judgment of the United States Supreme Court from this three-judge panel while the defendants pursue a declaratory judgment action before the district court for the District of Columbia. The majority of this panel believes this emergency stay should be granted. I respectfully dissent for the reasons which follow.

The role of a three-judge court is to adjudicate (1) whether a change is covered by § 5; and (2) if the change was covered, whether § 5 approval requirements were satisfied. See McCain v. Lybrand, 465 U.S. 236, 104 S.Ct. 1037, 1046 n. 17, 79 L.Ed.2d 271 (1984); and Lockhart. v. United States, 460 U.S. 125, 103 S.Ct. 998, 1001 n. 3, 74 L.Ed.2d 863 (1983). See also Campos v. City of Houston, 968 F.2d 446, 452 (5th Cir. 1992) (a three-judge court is required only to decide whether § 5 applies, and if so, whether it has been satisfied), cert. denied, ____ U.S. ____, 113 S.Ct. 971, 122 L.Ed.2d 126 (1993). Section 5 plainly contemplates injunctive relief. Indeed, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any United States District Court and that court, if it is shown that § 5 applies, must enjoin the utilization or implementation of any change in voting procedure until there is (compliance with § 5. See Lucas v. Townsend, 698 F.Supp. 909, 910 (M.D. Ga. 1988), citing Allen v. Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). Thus, the relief contemplated under § 5 clearly is injunctive relief to stay the enforcement of a State's suspect legislation pending federal review.

In the instant case this function has been completed. More importantly, this three-judge court's decision has been affirmed by the United States Supreme Court in its appellate capacity. When three-judge panels are used, direct appeal is to the United States Supreme Court[6]. This is the only circumstance where the Supreme Court still has appellate jurisdiction. See E. Cherminsky Federal Jurisdiction, 2d ed., § 10.3 p. 592, quoting Pub. L. No. 100-352, 102 Stat. 662 (1988). Thus, sitting as an "appellate court" reviewing the decision of a "district court," the Supreme Court issued its mandate in the form of a certified judgment. That judgment is binding and final. In view of the many authorities cited by the plaintiffs, I must conclude that the function of the three-judge panel in the instant case has come to a close and it has no authority to stay the execution of the Supreme Court's certified judgment (mandate).

Remedies to correct errors in conducting voting procedures which have not been precleared should be fashioned by the district court after hearing the views of the parties. See Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 440-41 (1971). The Perkins decision places this duty upon the district court, not upon a special three-judge panel called for the limited purpose of determining whether a State's enactment is covered by § 5 and requires preclearance. The majority misconstrues the directive of Perkins, believing that the Supreme Court was directing a three-judge panel to step outside the bounds of its very limited role. See Campos City of Houston, 968 F.2d at 451, citing United States v. Board of Supervisors, 429 U.S. 642, 97 S.Ct. 833, 834, 51 L.Ed 2d 106 (1977) (a three-judge court convened under § 5 is of limited jurisdiction and

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[6] Title 28 U.S.C. § 1253 provides for direct appeal from three-judge courts, as well as other specific statutes.

limited authority); McCain v. Lybrand, 104 S.Ct. 1037, 1050 (finding that preclearance of South Carolina's enactment was required and remanding the case to the district court, not to a three-judge panel, for further proceedings); Morse v. Republican Party of Virginia, ____ U.S. _____, 116 S.Ct. 1186, 1213, ____ L.Ed.2d _____ (1996) (after three-judge panel found matter did not require preclearance, Supreme Court reversed and remanded to the district court, not the three-judge panel, for further proceedings).

Then, even if this three-judge court should be construed as a "district court," a question arises as to what authority a district court might have over a matter once the mandate of an appellate court has been issued. The plaintiffs argue that whatever jurisdiction a district court has over matters on appeal ends when the appellate court issues its mandate, citing Belyeu v. Johnson, 82 F.3d 613, 615 (5th Cir. 1996) (citing non-habeas authority to conclude that appellate court's mandate superseded district court's original stay of execution); Brinkman v. Department of Corrections, 857 F.Supp. 775, 777 (D.Kan. 1994) (district court may issue stay while appeal is pending but loses the power to stay judgment once mandate is issued); Gander v. FMC Corp., 733 F.Supp. 1346, 1347 (E.D. Mo. 1990) (power of district court to grant a stay of judgment pending appeal terminates when mandate is issued) and Meridith v. Fair, 306 F.2d 374, 376 (5th Cir.), cert. denied, 371 U.S. 828 (1962) (holding that a single judge of the Circuit Court of Appeals could not stay an appellate court mandate because, once mandate had issued, logically it was too late to stay it).

Additional authorities illustrating the foregoing principal and cited by the plaintiffs are Gradsky v. United States, 376 F.2d 993, 995 (5th Cir.), vacated on other grounds sub nom., Roberts v. United States, 389 U.S. 18

(1967) (usually the issuance of a mandate by [the appellate court] means that the litigation has come to an end). accord Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789 (7th Cir. 1983) ("Once this court rendered its decision and docketed its mandate affirming the district court's dismissal of [plaintiff's] action against [defendant] no case or controversy any longer existed between the litigants herein."); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971) (quoting Gradsky), cert. denied, 406 U.S. 950 (1972); and Mirchandiani v. United States, 836 F.2d 1223, 1225 (9th Cir. 1988) (the requirement that lower courts adhere to the mandate of an appellate court is necessary to the operation of hierarchical judicial system).

However, notwithstanding this question of review authority in the face of a mandate of the appellate court, there remains the unquestioned authority of a district court to examine changes in fact or law, occurring subsequently to the mandate, which would make carrying out the judgment inappropriate or unjust. Of course, the mechanism for this form of consideration is a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. See Standard Oil of California v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), holding that a district court may entertain a Rule 60(b) motion without seeking a recall of mandate because the mandate does not deal with later events occurring after its issuance.

I agree with plaintiff that no "later events" have occurred since July 10, 1996, which would support setting aside the final judgment in the instant case under Rule 60(b). This record is barren of any mistake, surprise, excusable neglect, newly discovered evidence, fraud or misconduct. The certified judgment of the Supreme Court is not void and it has not been reversed. The Supreme Court has affirmed

our injunction which requires the defendants to comply with the Voting Rights Act. Finally, the defendants have utterly failed to present any extraordinary or unforeseen circumstances in support of the emergency stay. The expected consequences of this court's ruling being affirmed by the Supreme Court have been known to the defendants at least since August 27, 1993 when this court's judgment was entered. A recent and extensive newspaper article covering this matter reveals the affected school districts already to be well down the transitional road in light of the Supreme Court's June 10, 1996 judgment, with facility repairs and maintenance; upgrading of educational tools (five computers per classroom at Earl Travillion Middle School) and satisfactory teacher assignments throughout the system. If anything, granting an emergency stay at this point would create far more confusion for the affected school districts.

In support of granting the emergency stay, the majority relies on little more than the inherent power of courts to stay matters on their dockets. See Landis v. North American Company, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). Of course, the majority presumes that this three-judge panel is being asked to stay a matter on its docket when the actual request is for this court to stay a certified judgment of the Supreme Court. Landis' general rule simply does not apply to the instant case. The majority also cites Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 434, 27 L.Ed.2d 476 (1971) for the proposition that appropriate remedies for § 5 violations should be made by the district court. This three-judge panel on August 27, 1993 issued an injunction which was clarified on December 29, 1995. Thus, the appropriate remedy has been determined. The consequences of that remedy, if any, are not within the province of the three-judge panel to ameliorate. Furthermore, the consequences of the injunction have not been

shown by the defendants to be so insurmountable as to require granting an emergency stay of the United States Supreme Court's certified judgment by the district court under Rule 60(b).

So, after having spent years in an unsuccessful attempt to establish that the subject statute has been precleared, knowing full well the consequences of an unsuccessful campaign, the State unabashedly now asks this court to stay its injunction, allow the unprecleared statute to continue to govern, while the State embarks on new litigation in another court with an uncertain time period for resolution. Surprisingly, the majority has consented to this approach, an approach which in clear contravention of § 5 continues in force and effect an adjudicated unprecleared statute. Moreover, in view of the majority's decision, the arduous efforts of this three-judge court to resolve this dispute must be construed as nothing. By the majority's decision to allow a stay, the plaintiffs herein are right where they were when the litigation began, no matter that in the interim the United States Supreme Court has ruled in their favor and issued a mandate.

In addition to the plaintiffs, there is another victim here, § 5 itself. The majority's decision promises to undermine the directive and thrust of § 5. Section 5 relies upon the power of the injunction to prevent a covered state from imposing an unprecleared law upon its populous. Here, without benefit of any unexpected consequence befalling the State of Mississippi after the Supreme Court's ruling, the majority has decided to withhold its injunctive hand and, instead, politely wave at the defendants as they march by to another court and continue to operate as usual.

Stays of execution of certified judgments and mandates should be predicated upon doubtful questions of law unresolved by earlier court decisions. See Meredith v. Fair, 306 F.2d 374, 376 (5th Cir. 1962). They should not become ensconced in our jurisprudence as a tool for circumventing the findings of three-judge courts empaneled under § 5 which have been affirmed by the United States Supreme Court.

Therefore, I would not grant an emergency stay in the instant case and respectfully dissent to the opinion of the majority.

s\Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

Dupree v. Moore 3:90-cv-0043(W)
Dissent to Granting of Emergency Stay

APPENDIX B

IN THE UNITED STATES OF DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, et al. **PLAINTIFFS**

vs. **CIVIL ACTION NO. H90-0043(W)**

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, et al. **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT, et al. **DEFENDANTS/INTERVENORS**

ORDER

"Plaintiffs' Motion to Vacate Stay" is DENIED. Judge Wingate dissents.

SO ORDERED, this the 19th day of August, 1996.

s/RHESA HAWKINS BARKSDALE
RHESA HAWKINS BARKSDALE
UNITED STATES CIRCUIT JUDGE

s/TOM S. LEE
TOM S. LEE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES OF DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, et al. **PLAINTIFFS**

vs. **CIVIL ACTION NO. H90-0043(W)**

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, et al. **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT, et al. **DEFENDANTS/INTERVENORS**

ORDER

The "State Defendants' Emergency Motion for Stay" is GRANTED. An opinion in support of this Order will ssue in due course, with Judge Wingate in dissent.

SO ORDERED, this the 30th day of July, 1996.

s/RHESA HAWKINS BARKSDALE
RHESA HAWKINS BARKSDALE
UNITED STATES CIRCUIT JUDGE

s/TOM S. LEE
TOM S. LEE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

JOHNNY DUPREE, JEFF R. BOWMAN, KATHRYN JONES and CHARLOTTE TULLOS, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District, **PLAINTIFFS**

v. **Civil Action No. H90-0043(W)**

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and the STATE OF MISSISSIPPI, **DEFENDANTS**

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in Their Official Capacities, Charles L. Cameron, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis **DEFENDANTS/INTERVENORS**

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities **DEFENDANTS/INTERVENORS**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Johnny Dupree, Jeff R. Bowman, Kathryn Jones, and Charlotte Tullos, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District, the Plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the order entered on July 30, 1996, by the three-judge district court granting the "State Defendants' Emergency Motion for Stay" and the order entered on August 19, 1996, denying "Plaintiffs' Motion to Vacate Stay".

This appeal is taken pursuant to 28 U.S.C. § 2101(b) and 42 U.S.C. § 1973c.

DATED: August ___, 1996.

s/Perry Sansing
Perry Sansing, One of the
Attorneys for the Plaintiffs